IN THE

United States
Court of Appeals
For the Ninth Circuit

No. 14721

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ROSCOE WAGNER, d/b/a WAGNER TRANSPORTATION COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENT

ELI A. WESTON,
Residence: Boise, Idaho
Attorney for Respondent

IN THE

United States
Court of Appeals
For the Ninth Circuit

No. 14721

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ROSCOE WAGNER, d/b/a WAGNER TRANSPORTATION COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENT

ELI A. WESTON,
Residence: Boise, Idaho
Attorney for Respondent

INDEX

AUTHORITIES CITED

CASES

STATUTES

ADMINISTRATIVE DECISION

CONFERENCE REPORT

IN THE

United States
Court of Appeals
For the Ninth Circuit

No. 14721

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ROSCOE WAGNER, d/b/a WAGNER TRANSPORTATION COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENT

The only question to be determined in this case is whether or not employee Cecil Weyer, a truck driver, is entitled to compensation by way of back pay for the short period between February 16, 1954, and April 30, 1954.

While the "remedy" suggested by the Board includes posting of notices in addition to the payment of back pay, the Respondent has no objection to the posting of the notices providing the notice does not contain the words "We will make Cecil Weyer whole for any loss of pay suffered as a result of the discrimination against him."

This case is an example of the desire on the part of the National Labor Relations Board to pursue all matters to the bitter end causing the employer as much expense and embarrassment as possible. With the Board, all cases must go to Court. The amount involved in this case would probably run between $100.00 and 150.00 payment to a employee who is now working elsewhere and not interested in the case. The probable result of a Court Decision would be to disturb the present peaceful and harmonious relations between the employer and his employees, to renew old grievances and complaints and put the Respondent to additional expense.

The Petitioner endeavors to sustain its findings that the Respondent unlawfully discharged the employee Weyer by arguing that the Petitioner proved by a preponderance of the evidence the following alleged conduct by the Respondent:

(A) That the Respondent promptly manifested determined opposition to the Union's organizational campaign.

(B) That the Respondent alleged that if the union came in it would ruin him.

(C) That the company would never go union but would sell out first.

(D) That the employee Weyer was discharged for union membership.

A. THAT THE RESPONDENT PROMPTLY MANIFESTED DETERMINED OPPOSITION TO THE UNION'S ORGANIZATIONAL CAMPAIGN.

In referring to purported evidence to support its findings, Petitioner has repeatedly referred in the Record to the Trial Examiner's Intermediate Report and Findings and all references in Petitioner's Brief prior to page 41 of the Record are references of this kind and do not refer to the actual testimony of the witnesses in the case. Respondent does not feel that references to the Trial Examiner's Conclusions or inferences are to be considered by the Court as evidence if the inferences and conclusions are inconsistent with the statements by the witnesses themselves.

With reference to the Respondent's opposition to the union's organizational campaign, we call the Court's attention to the testimony by the organizer, himself, Cecil Jones, starting on page 52 of the Transcript and ending on page 59 which shows, contrary to the position by the Petitioner, that the Respondent voluntarily sought out the union organizer on February 16, 1954. Respondent told the organizer he wanted to discuss the union question and in the discussion the Respondent stated that he was paying all the wages that he could and that any

increase in wages or any sleeper-cab provisions of a contract similar to the one that was presented to the Respondent in 1951 would make it impossible for him to operate and that he would have to close or curtail his business as he had in 1951.

In the conversation between the Respondent and the organizer, the Respondent also stated that he would consent to an election and did consent to the same and the same was conducted. It is important to note that the Respondent agreed to sign a contract if it were a flexible contract, one under which the Respondent could operate and not suffer him to lose his business. (R 56).

At a second meeting in the evening of the same day when the organizer asked the Respondent to reinstate the employee Weyer, the Respondent stated that he would not reinstate him as the employee had called him a liar, and also that the employee Weyer had been killing too much time on his trips and that he had been drinking on the job and that he was laying up with some woman in Nevada. There is nothing in this conversation between the Respondent and the organizer to show any animosity to the union, but on the contrary it shows that the Respondent was willing to have a consent election and was willing to sign a contract providing the same was flexible, a contract under which he could operate, but that if it were such a contract as to be economically unworkable, the Respondent could not sign the same as it would drive him out of business.

In an Administrative Decision of the General Counsel, Case No. K-14, dated July 5, 1955, (CCH Paragraph 53,052) the General Counsel, in a case somewhat similar to this case, ruled that even though there might be some evidence that the discharge was discriminatory, where the employee, in a heated argument over the telephone with the superintendent, lost his temper, the General Counsel ruled that the employee could be discharged without penalty because of his tempermental outburst.

Section 10 (c) of the act provides, among other things, as follows:

> ". . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . ."

The Respondent in this case contends that even if there is some evidence of animosity to the union or discrimination against the employee, the fact that the employee engaged in a heated altercation with the employer and called him a liar, or other names of like character, this tempermental outburst disqualified the employee for future employment and justified the employee's discharge.

We fail to see how the Record sustains the Petitioner's position that the Respondent promptly manifested determined opposition to the union's organizational campaign.

B. THAT THE RESPONDENT ALLEGED THAT IF THE UNION CAME IN IT WOULD RUIN HIM.

The second point relied upon by the Petitioner to show discrimination, interference, restraint and coercion is the alleged statement by Roscoe Wagner that if the union ever stepped in it would ruin him. Here again we refer to the testimony of the organizer starting on page 52 wherein it appears that in the meetings between the Respondent and the union organizer the Respondent objected to the unworkable provisions of the proposed contract from Salt Lake City. The Respondent was willing to sign a contract, however he claimed that because of the distinct operating features of his business he could not sign the same kind of contract that had been presented and that it must be flexible. This position on the part of the Respondent is born out by his testimony beginning on page 108 of the Record whereas it appears that in the 1951 controversy the Respondent agreed to a contract in all respects except the so-salled "sleeper cab contract". It appears from the testimony on pages 108 and 109 that the Respondent could not operate with the "sleeper cab contract" and so informed the union.

This testimony by both the organizer Jones and the Respondent Roscoe Wagner clearly shows that the Respondent was stating an actual fact in presenting an economic reason why he could not operate under the sleeper-type contract proposed by the union. Without the objectionable provisions the

company was willing to sign a contract with the union. Certainly the respondent has a right to state the economic reasons why he cannot operate and tell the union that if the contract is unworkable and prohibitive it would ruin him. After all, it is an expression of opinion on the part of the Respondent as to conditions under which he can or cannot operate his business. This also refers to the third reason relied upon by the Petitioner to show interference, restraint, coercion and discrimination in this case.

C. THAT THE COMPANY WOULD NEVER GO UNION BUT WOULD SELL OUT FIRST.

Here again we have practically the same thing relied upon by Petitioner under Point (B), and we again suggest that a review of the statements by both the labor organizer and Roscoe Wagner support the position that the statement "You know we will never go union . . . they tried it once and we sold out." refers to the fact that the company could not operate under the type of contract presented to the Respondent containing the objectionable "sleeper cab" provision. This statement does not show animosity or opposition to the union or a desire to interfere, restrain or coerce members of the union, but on the contrary it is a straight forward factually supported statement that the company could not operate under the proposed contract. The proposal was economically unsound and the union had tried to force this type of contract at a former time but was unsuccessful. All the way through this case

we find the Respondent willing to sign a contract that is workable and flexible. Respondent consented to an election to determine the question of bargaining for the contract but he definitely states he cannot and will not operate under a contract which will drive him out of business.

D. THAT THE EMPLOYEE WEYER WAS DISCHARGED FOR UNION MEMBERSHIP.

The Petitioner bases its entire case on what it alleges as bias or prejudice on the part of the employer towards the union. To support this contention they go back as far as 1951 and attempt to show by isolated statements that the employer had animosity or prejudice against the union. Respondent contends that this is completely overcome by the testimony of the organizer, himself, beginning on page 54 of the Transcript that the employer willingly offered to sign a contract providing the same was workable and flexible and within the limits of the company's economic possibilities. Testimony further shows that the employer agreed to a consent election which was conducted and in all ways cooperated with the organizer until the employer discovered that the contract presented was unconscionable and impossible of operation.

This brings us then to the real question in the case, was the employee Weyer discharged discriminatorily and for union sympathy?

Respondent refers again to Section 10 (c) of the Act and particularly to the following words in said Section:

> ". . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . ."

and again the Respondent repeats its position that if the facts in the case show that the employer had cause for the discharge and that if the cause was the prime reason, the discharge was not discriminatory and the employee would not be entitled to reinstatement.

In the case of Local No. 3, United Packinghouse Workers, CIO vs. NLRB, 210 F 2d 325, the Court stated that the burden of proof on unfair labor practice charges rests upon the Board and is at no time shifted to the employer.

> "Burden of proof of unfair labor practice charges rests upon the Board and is at no time shifted to employer. Employer who, in defense to charges of discriminatory discharges and refusals of reinstatement, contends that employees furnished good cause for his action does not have burden of proving existence of good cause. Evidence tending to show causes other than union membership or activity is admissible and tends to disprove charge of discrimination. To sustain burden of proof, Board must introduce evidence sufficient to outweigh employer's defensive evidence."

In the case of Blue Flash Express, (109 NLRB 85) the Board held that the General Counsel failed to sustain the burden of proof where the evidence sharply conflicted and the Trial Examiner resolved that conflict by discrediting the General Counsel's witnesses.

The general principle that the employer is not required to exonerate himself of unfair labor practice charges and that the burden of proof rests upon the Board to prove charges affirmatively and by substantial evidence is affirmed in the following cases:

> "Employer is not required to exonerate himself of unfair labor practice charges. Burden of proof rests upon Board. Board must prove charges affirmatively and by substantial evidence." NLRB vs. MacSmith Garment Co. (203 F 2d 868); NLRB vs. National Die Casting Co., (207 F 2d 344); NLRB vs. Reynolds International Pen Co. (162 F 2d 680).

In the Conference Report from the 1947 Act entitled Correlation of Evidence Requirements of Amended Act, the Conference Committee has this to say:

> "Under the language of section 10(e) of the present act, findings of the Board, upon court review of Board orders, are conclusive 'if supported by evidence'. By reason of this language, the courts have, as one has put it, in effect, 'abdicated' to the Board." NLRB vs. Standard Oil Company (138 F 2d 885).

"In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact." NLRB vs. Hearst Publications, Inc. (322 U. S. 111).

"As previously stated in the discussion of amendments to section 10(b) and section 10(c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions. While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review."

CONCLUSION

In conclusion, Respondent respectfully submits that the evidence in this case does not support the contentions of the Petitioner that this Respondent held any animosity or ill feeling toward the union and further that the evidence in this case does not

support the finding that the employee Weyer was discriminatorily discharged.

Respectfully submitted,

ELI A. WESTON
Attorney for Respondent.

Dated: August, 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C., Secs 151, et seq.) are as follows:

Sec. 10 (c) * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *